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THE MANAGEMENT OF LAND AND WATER USE IN THE COASTAL ZONE: A NEW LAW IS ENACTED IN NORTH CAROLINA

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With the passage of the Coastal Area Management Act of 1974 (CAMA),[1] North Carolina, which possesses the second largest estuarine complex on the east coast of the United States[2], has joined the ranks of those few coastal states[3] that have initiated a comprehensive program for the management of the land and water resources of their coastal zones. The new law, which is the culmination of almost a decade of effort by many people, was the subject of intensive and sometimes acrimonious debate; it is the product of a compromise between many different groups and values and is not without significant weaknesses. Nevertheless, it represents a new point of departure for management of the coastal environment in North Carolina. This article will analyze and evaluate this law in the light of the Federal Coastal Zone Management Act of 1972,[4] and other comprehensive state coastal zone management laws, will describe the significant new legal

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1. N.C. GEN. STAT. §§ 113A-100 to -129 (1974 Advance Legislative Service, pamphlet no. 3).

2. 3 FISH & WILDLIFE SERVICE, U.S. DEP'T OF INTERIOR, NATIONAL ESTUARY STUDY, H.R. Doc. No. 286, pt. II, 91st Cong., 2d Sess. 113 (1970). North Carolina's estuarine resources are greater in importance than those of any other east coast state. A. HAWLEY, THE PRESENT AND FUTURE STATUS OF EASTERN NORTH CAROLINA WETLANDS 1 (Water Resources Research Institute of Univ. of N.C. Rep. No. 87, 1974).

3. Only California, Rhode Island and Washington have enacted comprehensive coastal zone management programs; *see* CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1974); R.I. GEN. LAWS ANN. §§ 46-23-1 to -16 (Supp. 1973); WASH. REV. CODE §§ 90.58.010-.930 (Supp. 1973). In addition, Florida and Hawaii have enacted statewide land use management laws which are applicable to the coastal zone; *see* FLA. STAT. ANN. §§ 380.01-.10 (Supp. 1973); HAWAII REV. STAT. §§ 205-1 to -37 (1968), *as amended*, (Supp. 1973). Most coastal states have enacted laws limited to wetlands protection or the control of large developments. For a summary of these laws see Ausness, *Land Use Controls in Coastal Areas*, 9 CALIF. W.L. REV. 391, 407-10 (1973); Ausness, *A Survey of State Regulations of Dredge and Fill Operations in Nonnavigable Waters*, 8 LAND & WATER L. REV. 65 (1973); Zwicky & Clark, *Environmental Protection Motivation in Coastal Zone Land-Use Legislation*, 1 COASTAL ZONE MANAGEMENT J. 103 (1973).

4. 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

processes instituted and will discuss some of the new legal questions raised by it.

I. NEW OBJECTIVES, POLICIES AND GOALS

The establishment of a coastal zone management program has become necessary primarily because increasing use pressures on the limited and fragile land and water resources of the North Carolina coast are threatening its continuing viability. Public and official attention was first directed solely to the estuarine area, the naturally fertile, semi-enclosed shallows that are characterized by a mixture of fresh water brought down from the upland by rivers and salt water carried in by the tides.[5] The concern resulted from the increasing pollution of estuarine waters,[6] diking and filling of the salt marshes and destruction of the dunes and maritime forests that are integral parts of the estuarine ecosystem. It soon became clear, however, that management of the estuarine area with its attendant salt marshes and beaches was not enough. Any successful management program must include transitional areas, including millions of acres of freshwater wetlands influenced by the estuarine or marine area and portions of the adjacent uplands. The latter areas must necessarily be included because activities there frequently have an impact on the estuarine zone,[7] management of the coastal zone may result in transfer of major development several miles inland[8] and because of the need that a management system take into account existing political boundaries such as counties and cities. Thus coastal zone management legislation is now the cutting edge and testing ground for newer land use laws which differ from the traditional land use controls in that their purpose is not just to prevent and referee between conflicting uses of land and to provide for physical development, but to protect the en-

5. North Carolina's estuaries exceed 2,200,000 acres in total area. *See* Rice, *Estuarine Lands of North Carolina: Legal Aspect of Ownership, Use and Control*, 46 N.C.L. REV. 779 (1967); R. Bode & W. Farthing, Coastal Area Management in North Carolina: Problems and Alternatives 4-6, Feb. 11, 1974 (N.C. Law Center publication).

6. The closing of estuarine areas to the harvesting of oysters has become increasingly common in North Carolina as well as other coastal states. A large percentage of the estuarine area of North Carolina has been declared unsafe for shell-fishing. *See* Comment, *Estuarine Pollution: The Deterioration of the Oyster Industry in North Carolina*, 49 N.C.L. REV. 921, 922 (1971).

7. Vacation home developments near the coast, for example, often cause destruction of fresh-water wetlands, pollution and sedimentation run-off into the estuaries.

8. *See* Mandelker & Sherry, *The National Coastal Zone Management Act of 1972*, 7 URBAN L. ANNUAL 119, 127 (1974).

vironmental integrity and productivity of land as a limited resource as well.[9]

It is customary for legislative acts to contain provisions dealing with goals and policy. These are commonly regarded as bland recitals that are of secondary importance to the operative provisions of the law. There are several reasons why this should *not* be the case with the North Carolina Coastal Area Management Act. First, the Act is not a technical statement in a more legally efficient form of traditional legal principles, neutral from a policy standpoint. It is rather an *instrumental* use of law, attempting to attain certain specific and new public policy goals and to influence human behavior through law.[10] The goals and policies that emerged in the CAMA are the product of the democratic processes of participation, compromise and consensus. The law will be effective only if its goals and policies are the basis of actual decisionmaking.

Secondly, the CAMA delegates substantial discretionary powers of decisionmaking to administrative agencies and local governments. If CAMA is to be more than a "zero law," one which has no discernible effect in the real world, these units of government must exercise their authority with a view to implementing the policies of the Act. The central concept of the law is its view of the lands and waters of the coastal zone as a resource which must be allocated among different users. A major premise is that the traditional allocator of limited resources, the market, works imperfectly. The market has discriminated in favor of short-run pecuniary profit because the value of public property rights has often been ignored and wetlands have been historically undervalued as water resources while many activities that threaten the destruction of wetlands have been overvalued.[11] The CAMA is an instrument to supplement the market as an allocator of the resources of the coastal zone with political and administrative action. The policies of the CAMA are accordingly guides to the resolution of conflicts

9. The point of departure for traditional zoning is data regarding projected population and physical growth trends; newer land use controls begin with an analysis of the character of lands and their suitability for development. *See generally* F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

10. For additional information on the instrumental use of law see Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 43-45 (1969); Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

11. *See* Pope & Gosselink, *A Tool for Use in Making Land Management Decisions Involving Tidal Marshland*, 1 COASTAL ZONE MANAGEMENT J. 65 (1973); Walker, *Wetlands Preservation and Management on Chesapeake Bay: The Role of Science in Natural Resource Policy*, 1 COASTAL ZONE MANAGEMENT J. 75, 94 (1973).

between potential users of the resource and to the making of the allocative decision. They are thus of paramount importance.

What are the policies and goals[12] of the CAMA? On the one hand, it is clear that economic development of the coastal zone will not cease; an explicit policy of the Act is to provide for orderly development of improved transportation, housing and industrial, commercial and recreational facilities.[13] On the other hand, the Act announces an explicit policy of preservation and management of the natural ecological conditions of the estuarine system; development is to proceed only in a manner consistent with the capability of the land and water for development, use or preservation based on ecological considerations.[14] In addition, existing public rights of ownership, use and access to coastal resources are to be preserved.[15]

How can such different policy goals be accomodated in a single decisionmaking process? The key to conflict resolution is the establishment of a comprehensive management plan and an administrative mechanism to implement it. The management plan, however, should be preceded by and based upon a detailed and systematic identification of the ecosystems and resources of the coastal area and the relative capability of the lands and waters to withstand development. Priorities of uses can thus be assigned to different categories of lands and waters; developmental uses can be given priority in certain areas while preservation uses are paramount in other ways. The plan must not be static; it should be subject to amendment based on new underlying data, however, not merely upon ad hoc applications by individual developers. In this way planning can guide and accomodate development and not vice-versa. This process is an integral part of the CAMA, although in a form that is somewhat flawed.[16]

Developmental projects that are proposed for areas outside of those in which development is to be given priority should be judged on the basis of whether the benefits and the need for the particular location exceed the costs—not only economic but ecological and envi-

12. It should be recognized that policies and goals are not static and immutable but are subject to constant re-evaluation and reformulation through the political and democratic process.

13. N.C. GEN. STAT. §§ 113A-102(b)(4) b., c., d. (1974 Advance Legislative Service, pamphlet no. 3).

14. *Id.* §§ 113A-102(b)(1)-(2).

15. *Id.* §§ 113A-102(b)(4). For an account of the rights of the public in North Carolina see Schoenbaum, *Public Rights and Coastal Zone Management*, 51 N.C.L. REV. 1 (1972).

16. *See* text accompanying notes 72-75, 90-97 *infra.*

ronmental—that are involved. The more fragile and the more critical the area is from an environmental viewpoint, the greater should be the burden of proof as to the benefit of the particular form of development.

Furthermore, any form of development, even those in areas for which development is given priority, should include reasonable measures necessary to mitigate the impact of development on the natural environment.[17] Mitigation measures required should be appropriate to the fragility and character of the lands and waters affected. For example, marinas should be designed to include facilities for proper handling of litter, wastes, refuse and petroleum products; docks and piers should be constructed in a manner that does not restrict water flow.

In addition, it is the policy of the CAMA that regulatory authority be exercised consistent with private property rights protected by the constitutional law of North Carolina and the United States.[18] The law of North Carolina is, however, that the landowner is not protected from all reductions in the value of his property by reasonable exercise of the police powers of the state.[19] Decisional law in other jurisdictions has validated the reasonable exercise of legislative and administrative authority to protect shorelands and wetlands from development that would interfere with the public interest.[20]

II. Background and Development of the CAMA: The Process of Policy Formulation

The changes in public policy that are reflected in the CAMA are the result of a slow evolutionary process. Developments in North Carolina were paralleled by activity on the federal level. In 1966, the United States Congress established a Commission of Marine Science, Engineering and Resources in order to report on the preservation of shorelands and estuaries and the effective use of under sea resources.

17. This is an explicit policy of the CAMA. N.C. Gen. Stat. § 113A-102(a) (1974 Advance Legislative Service, pamphlet no. 3).

18. *Id.* §§ 113A-102(a),-128.

19. *In re* Parker, 214 N.C. 51, 56, 197 S.E. 706, 710 (1938); *see* Comment, *Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning*, 49 N.C.L. Rev. 866, 883-87 (1971).

20. *See* Rykar v. Gill, 6 E.R.C. 1333 (Conn. Super. Ct. 1973); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). A full discussion of the "taking" problem is beyond the scope of this article, but can be found in Glenn, *The Coastal Area Management Act in the Courts: A Preliminary Analysis*, 53 N.C.L. Rev. 303, 327-38 (1974).

The Commission's final report, *Our Nation and the Sea*,[21] emphasized the value of the resources of the coastal zones of the nation and recommended the establishment of a federal coastal zone management program. In 1970, the *National Estuarine Pollution Study*[22] was published. This report by the Secretary of the Interior, which was prepared under the provisions of the Clean Water Restoration Act of 1966,[23] described the economic and environmental value of the estuarine lands and waters of the United States and showed the necessity for a management program. In 1972, Congress passsed the Federal Coastal Zone Management Act[24] that provides federal assistance and coordination to the states to develop and implement management programs to preserve and develop the resources of the coastal zone.

Although the process of policy formulation in North Carolina was influenced by developments on the federal level, it has for the most part proceeded independently from the federal effort. For most of the state's history the policy of the law was that wetlands, to the extent they were not navigable, should be "reclaimed" and put to "productive" use.[25] The shift away from this policy began in 1959 with the passage of the State Lands Act,[26] which put limits on the conveyance of state-owned wetlands and declared as a general policy that the submerged lands of the state were to be preserved for the people.

Little was done to implement this general policy until 1965. In that year the General Assembly enacted an ownership registration statute to attempt to clarify conflicting claims of ownership to submerged lands.[27] In 1969, largely as the result of recommendations by an ad hoc study committee,[28] the General Assembly directed that the Com-

21. COMMISSION ON MARINE SCIENCE, ENGINEERING AND RESOURCES, OUR NATION AND THE SEA (1969).

22. U.S. DEP'T OF THE INTERIOR, THE NATIONAL ESTUARINE POLLUTION STUDY, S. DOC. No. 58, 91st Cong., 2d Sess. (1970).

23. 33 U.S.C. § 1153 (1970).

24. 16 U.S.C. §§ 1451-64 (Supp. II, 1972).

25. For an account of the history of this legislative policy see Schoenbaum, *supra* note 15, at 8-10.

26. Act of June 2, 1959, ch. 683, [1959] N.C. Sess. Laws 612 (codified at N.C. GEN. STAT. ch. 146 (1974)).

27. Act of June 11, 1965, ch. 957, § 2, [1965] N.C. Sess. Laws 1329 (codified at N.C. GEN. STAT. § 113-205 (1972)). In 1968, a comprehensive legal study on the ownership problem was published. Rice, *supra* note 5. *See also* Schoenbaum, *supra* note 15; Comment, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina*, 49 N.C.L. REV. 888 (1971).

28. The Estuarine Study Committee was established by the Inter-Agency Council on Natural Resources in 1967. For an account of this committee's work see R. Bode & W. Farthing, *supra* note 5, at 24-26.

missioner of Commercial and Sport Fisheries formulate a comprehensive plan for the management of the coastal zone of the state and to report to it by 1973.[29] In 1969 the General Assembly also appropriated moneys for the acquisition of estuarine lands[30] and enacted stopgap legislation regulating the dredging and filling of estuarine land and the alteration of sand dunes.[31] In 1971, strengthening amendments were added to these laws,[32] and in 1972, an "environmental bill of rights" constitutional policy of protection of wetland and shoreland resources was passed.[33]

In the early 1970's several state-level studies were carried out to provide the necessary technical background for management of the coastal area. The Office of Sea Grant of the University of North Carolina sponsored both scientific and legal research on coastal matters.[34] In addition, the North Carolina Marine Sciences Council published planning reports on marine and coastal resource development,[35] and the Commissioner of Commercial and Sports Fisheries formed an "Estuarine Planning Committee" whose members were drawn from diverse backgrounds of expertise and interest groups and which was charged with the task of developing what was to become the CAMA.[36]

In 1973, a proposed coastal zone management bill based on the work of the Estuarine Planning Committee was introduced in the General Assembly. Legislative action was delayed until 1974, however, largely because local governments wanted a greater share in the development and administration of the coastal management program.[37] The 1973 General Assembly did, however, enact legislation dealing with the problem of marine pollution.[38]

In preparation for the consideration of coastal zone management by the General Assembly in 1974, members of the General Assembly

29. Act of June 30, 1969, ch. 1164, [1969] N.C. Sess. Laws 1343.

30. *See* Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351, 377 (1973).

31. N.C. GEN. STAT. § 104B-16 (1972); *id.* § 113-229 (Supp. 1973).

32. *Id.* § 113-230 (Supp. 1973).

33. N.C. CONST. art. XIV, § 5.

34. *See* [1971-1972] UNC SEA GRANT ANN. REP.

35. N.C. MARINE SCIENCE COUNCIL, NORTH CAROLINA'S COASTAL RESOURCES (1972); N.C. MARINE SCIENCE COUNCIL, NORTH CAROLINA AND THE SEA (1971).

36. For an account of the activities of the Estuarine Planning Committee see R. Bode & W. Farthing, *supra* note 5, at 32-48.

37. *See* Heath, *State and Local Roles in Coastal Zone Planning and Management*, in REPORT OF THE GOVERNORS' CONFERENCE ON MARINE RESOURCES 27, 28 (1973).

38. N.C. GEN. STAT. §§ 143-215.75-.99 (1974).

held public hearings on the proposed bill in the coastal counties as well as other parts of the state. The bill was also revised to give a greater share of control to local governments.

The legislative history of the CAMA in 1974 can be found in greater detail elsewhere.[39] Suffice it to say that the bill was opposed by a coalition of developers, bankers and some local governments.[40] Although the opposition was unsuccessful in preventing passage of the bill, several amendments were added[41] that caused many conservationist supporters of the Act to express doubt as to its effectiveness.[42]

It is impossible to predict, however, whether the CAMA will provide an effective instrument for the implementation of the important policies formulated by the General Assembly. The decisionmaking processes established by the law are complex and their administration will be difficult. It is essential that they are well-understood and carried out with a view to implementing the policies of the Act.

III. THE MANAGEMENT PROGRAM ESTABLISHED BY THE CAMA

Although the CAMA evolved out of the necessity to take action regarding the particular problems of the North Carolina coastal area and was tailored to be consistent with prior North Carolina law and institutions, it was drafted with a view to complying with the requirements of the Federal Coastal Zone Management Act.[43] The federal act, in turn, was influenced heavily by the pattern recommended by the Model Land Development Code of the American Law Institute (ALI).[44] Thus, like the comprehensive coastal management laws passed in Washington and California and the statewide land use laws of Vermont and Florida, the CAMA establishes legal mechanisms that are similar to the ALI approach. A planning process is combined with a regulatory process concerning areas of special environmental signifi-

39. *See* Heath, *The Legislative History of the Coastal Management Act*, 53 N.C.L. REV. 345 (1974).

40. The News and Observer, April 12, 1974, at 1, cols. 7-8.

41. *See* Heath, *supra* note 39.

42. *See* The News and Observer, April 15, 1974, at 25, col. 4.

43. 16 U.S.C. §§ 1451-64 (Supp. II, 1972). This law provides federal financial and technical assistance to coastal states that institute a coastal area management program in compliance with federal guidelines. The National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, has adopted guidelines for grants to states to develop management programs. *See* 15 C.F.R. §§ 920-20.49 (1974). At this writing, NOAA has also proposed for comment guidelines for federal approval of administrative grants that are available once a management program has been developed. *See id.* §§ 923.1-.58.

44. MODEL LAND DEVELOPMENT CODE (Proposed Official Draft No. 1, 1974).

cance. The CAMA, however, gives local governments greater participation in the decisionmaking process than management programs in other states.

A. The Area Covered

One of the most difficult issues in the formulation of a coastal zone management bill has been the definition of the geographical area to which regulation will apply. The federal act defines the coastal zone in terms of the extent to which the land and sea environments strongly influence each other[45] and requires the states to identify the boundaries of their coastal zone in order to qualify for federal assistance.[46] The vagueness of the definition of the coastal zone is not cleared up in the federal guidelines promulgated by the National Oceanographic and Atmospheric Administration (NOAA).[47] It is clear only that the states are intended to have maximum flexibility in coastal zone designation.[48] Each state must formulate its own definition of its coastal zone considering its own particular conditions.[49]

The CAMA designates the seaward boundary of the "coastal area" as the limit of the state's jurisdiction (not less than three geographical miles offshore).[50] The landward boundary of the coastal area consists of the western boundaries of twenty coastal counties that were

45. 16 U.S.C. § 1654(a) (Supp. II, 1972).
46. *Id.* § 1655(b)(1).
47. *See* 15 C.F.R. § 920.11 (1974).
48. *See* Mandelker & Sherry, *supra* note 8, at 128.
49. Among those states that have adopted coastal zone management legislation, the definition of the "coastal zone" differs widely. For example, Washington's definition consists of specifically described waters and shorelands and provides two tests through which further areas ("associated wetlands") may be designated by the Department of Ecology. WASH. REV. CODE §§ 90.58.030(2)(c)-(e) (1971). A somewhat arbitrary designation by the Department of Ecology was upheld in Juanita Bay Valley Community Ass'n v. City of Kirkland, 9 Wash. App. 59, 510 P.2d 1140 (1973); *see* Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 434 (1974). The California act defines the coastal zone as extending seaward to the limit of the state's jurisdiction and landward to the highest elevation of the nearest coastal mountain range, except in three counties (Los Angeles, Orange and San Diego) in which the landward boundary is the shorter of the distances to the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line. CAL. PUB. RES. CODE § 27100 (West Supp. 1974). Delaware defines its coastal zone as seaward to the limit of the state's jurisdiction and landward to a jagged line following various state and federal highways and roadways. DEL. CODE ANN. tit. 29, § 7002 (Supp. 1972).
50. N.C. GEN. STAT. § 113A-103(2) (1974 Advance Legislative Service, pamphlet no. 3). The seaward limit of the State's jurisdiction is still uncertain. *See* Maloney & Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C.L. REV. 185 (1974).

designated by the Governor on April 29, 1974,[51] under the authority and in accordance with the standards of the Act.[52] All the counties included in the coastal area are bounded by either the Atlantic Ocean or a coastal sound.[53]

North Carolina's designation of the "coastal area" should be sufficient to fulfill the requirements of the NOAA guidelines. It takes into account not only biophysical and economic factors but also existing local government boundaries as is specifically required by the federal guidelines.[54] In addition, a companion bill, the Land Policy Act of 1974,[55] authorizes the state to offer planning assistance on a voluntary basis to all local governments statewide that will permit land use in the non-coastal counties as well as statewide policies and programs to be coordinated with coastal zone planning.[56]

B. The Planning Process

Before the enactment of the CAMA, land use planning was largely ignored by the local governments with jurisdiction over the coastal area. Few counties and municipalities had exercised the land use powers delegated to them under the state planning and zoning enabling acts,[57] and only one county, Currituck, had recognized the need for a moratorium on development and the adoption of a plan for guiding development that would safeguard environmental values.[58]

The CAMA institutes comprehensive land and water use planning for the coastal area. Each coastal county is required to adopt a land use plan subject to state approval and under guidelines formulated by

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51. The counties designated are Beaufort, Bertie, Brunswick, Camden, Chowan, Craven, Carteret, Currituck, Dare, Gates, Hertford, Hyde, New Hanover, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell and Washington. The News and Observer, April 30, 1974, at 24, col. 5.

52. N.C. GEN. STAT. § 113A-103(2) (1974 Advance Legislative Service, pamphlet no. 3).

53. Because of the configuration of the North Carolina coast, it was necessary to define "coastal sound" in terms of the limit of seawater encroachment on tributary rivers and certain specified points on the tributary rivers that define the farthest inland movement of salt water under normal conditions. *Id.* § 113A-103(3). Two counties, Jones and Martin, which were included in the coastal area in earlier drafts of the CAMA, were thus excluded as being entirely west of such points.

54. 15 C.F.R. § 920.11(a) (1974).

55. Law of April 12, 1974, ch. 1306, [1973] N.C. Sess. Laws 597.

56. This action is encouraged by the federal guidelines. 15 C.F.R. § 920.11(b) (1974).

57. N.C. GEN. STAT. §§ 153A-320 to -398 (1974).

58. *See* R. Bode & W. Farthing, *supra* note 5, at 61-65.

the state. If the county fails to act, the State will prepare the plan.[59] In addition, the State directly participates in the planning process through its power to designate and specify the boundaries of "areas of environmental concern."[60]

The planning process established by the CAMA is to be carried out on a step-by-step basis over a period of several months. The first step requires the Coastal Resources Commission (CRC), a new state agency created by the Act and given the principal state responsibility for coastal zone regulation, to develop proposed state guidelines consisting of objectives, policies and standards for the public and private use of lands and waters within the coastal area. The local governments have until December 1, 1974, to comment upon the guidelines which must be adopted in final form by the CRC on or before February 1, 1975.[61]

Each county within the coastal area has until December 1, 1975, to complete the preparation and adoption after a public hearing, of a land use plan consistent with the state guidelines.[62] The plans must consist of objectives, standards and policies for public and private uses as well as maps showing existing uses and use relationships and specific criteria for particular areas. After adoption, but before it is effective, the land use plan must be submitted to the CRC for review. The CRC may require changes in the plan, which cannot become effective until after final approval by the CRC.[63]

The CRC, in addition to its indirect control of county land use plans, has important direct planning responsibilities under the CAMA.

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59. N.C. GEN. STAT. § 113A-109 (1974 Advance Legislative Service, pamphlet no. 3).

60. *Id.* § 113A-113. *See* text accompanying notes 64-67 *infra.*

61. N.C. GEN. STAT. § 113A-107 (1974 Advance Legislative Service, pamphlet no. 3). The CAMA provides for mandatory review of the guidelines by the CRC every five years. In addition, amendments can be made from time to time following a procedure similar to that required for the initial adoption of the guidelines. *Id.* § 113A-107(f).

62. To assume this function, each county must have filed by November 1, 1974, a written statement with the CRC stating its intention to develop a land use plan. In the event any county fails to make such a declaration, the CRC will prepare and adopt the plan by the date required. *Id.* § 113A-109. It is expected, however, that all the counties will elect to develop their own plans. The counties may delegate all or some of their planning responsibilities to regional planning agencies. *Id.* § 113A-110(b). In addition, the counties can delegate responsibility to cities within their jurisdiction and, on written application from a city to the CRC, the CRC must require the county to delegate plan-making authority to cities for land within their jurisdiction if the CRC finds that the city is currently enforcing its zoning ordinance, subdivision regulations and building code. *Id.* § 113A-110(c).

63. *Id.* § 113A-110(f).

After a public hearing in each county in which lands to be affected are located, the CRC must by rule designate certain geographical areas of the lands and waters of the coastal area as "areas of environmental concern"[64] within which development is to be closely regulated.[65] Areas that may be declared to be within this category by the CRC include coastal wetlands, estuarine lands and waters, renewable resource areas such as watersheds, aquifers and forest lands, important natural and historic areas such as state parks and forests, scenic rivers, stream segments classified for scientific or research uses, wildlife areas, areas to which the public may have special rights under the public trust doctrine,[66] areas prone to hurricanes or flooding and areas subject to secondary developmental pressures because of key public facilities such as highways and airports.[67] New areas may be added and designated areas may be deleted by the CRC from time to time, and all areas designated must be reviewed at least every two years, but no area may be dropped unless it is found that the conditions upon which the original designation was made have been substantially altered.[68]

The CAMA does not contain a deadline by which the initial round of designation of areas of environmental concern must be completed. To ensure some interim control, however, the CRC may designate interim areas of environmental concern before such areas are finally determined.[69] The designation of interim areas remains in effect only until the final areas of environmental concern are determined.[70]

A problem that will be encountered in the implementation of this planning process is a lack of substantive guidance for the development

64. *Id.* §§ 113A-113, -115.

65. *See* text accompanying notes 98-103 *infra.*

66. The public trust doctrine is a legal principle of broad applicability in coastal areas which, in general, holds that lands below mean high tide as well as water resources are owned by the state in trust for its citizens. *See* Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine,* 79 YALE L.J. 762 (1970).

67. N.C. GEN. STAT. § 113A-113(b) (1974 Advance Legislative Service, pamphlet no. 3).

68. *Id.* § 113A-115(c).

69. *Id.* § 113A-114(a). Before designating interim areas, the CRC must have held one-day public hearings in six specified cities (Elizabeth City, Jacksonville, Manteo, Morehead City, Washington and Wilmington) between July 15, 1974, and September 15, 1974. *Id.* § 113A-114(d). It has been tentatively proposed that interim areas of environmental concern include (1) the outer banks areas of the state which lie between the intra-coastal waterway and the Atlantic Ocean, (2) coastal wetlands, (3) estuarine areas, (4) certain other historic or ecologically fragile areas. Statement of James E. Harrington, Secretary, N.C. Dep't of Natural and Economic Resources, in The News and Observer, Sept. 8, 1974, § IV, at 5, col. 6.

70. N.C. GEN. STAT. § 113A-114(d) (1974 Advance Legislative Service, pamphlet no. 3).

of the state guidelines and the county land and water use plans. The CAMA merely provides that both must be consistent with the policies of the Act and shall consist of objectives, policies and standards. The land use plans, in addition, must be supplemented by maps "showing the appropriate location of particular types of land or water use and their relationships to each other and to public facilities and . . . specific criteria for particular types of land or water use in particular areas."[71] Other comprehensive state management laws such as California's[72] and Vermont's[73] specify in more detail the components required in management plans. Furthermore, the Federal Coastal Zone Management Act of 1972 and the NOAA guidelines require state management programs to define permissible land and water uses that have a direct and significant impact on coastal waters as well as the designation of priority uses (including those of lowest priority) within specific geographical areas throughout the coastal zone.[74]

This difficulty will not be severe, however, if the planning process and the goals and policies of the CAMA are considered together. The Act contemplates the division of the lands and waters of the coastal zone into two broad categories, areas designated as areas of environmental concern and all other lands and waters.[75] Accordingly, the first planning requirement is that local government land and water use plans reflect this division and be consistent with the CRC's inventory and designation of areas of environmental concern. This is specifically required by the CAMA[76] and is a key element required of a management program by the NOAA guidelines.[77]

Second, it is essential that a continuing inventory be maintained of the resources, values and characteristics of the coastal zone with a view to the capability of the lands and waters for use and development. A statutory duty to compile such data is implicit in the Act. First, land use plans must obviously be based on factual data. Secondly, the Act has a specific policy mandate of the CAMA that the development or preservation of the lands and waters of the coastal area proceed "in a manner consistent with the capability of the land and

71. *Id.* § 113A-110(a).
72. CAL. PUB. RES. CODE § 27304 (West Supp. 1974).
73. VT. STAT. ANN. tit. 10, §§ 6042-43 (1973), *as amended*, (Cum. Supp. 1974).
74. 16 U.S.C. §§ 1454(b)(2), (5) (Supp. II, 1972).
75. *See* text accompanying notes 64-67 *supra*.
76. N.C. GEN. STAT. § 113A-111 (1974 Advance Legislative Service, pamphlet no. 3).
77. 15 C.F.R. § 920.13 (1974).

water for development, use, or preservation based on ecological considerations."[78] The compilation of such data as the basis of planning is also required and has been done in other states which have passed comprehensive land management laws.[79] This step is also essential under the NOAA guidelines for state coastal management programs.[80] This inventory would include such things as soil information, forest types and covers, ecosystem and wetland inventories, surface and underlying topography, hydrology and flood data, social data regarding population distribution and settlement patterns, historic sites, public rights areas, air and water quality and economic data. Much of this information is already available through specialized state and federal agencies and published scientific monographs and reports.[81] It must be pulled together into useful form; it can then provide the basis and background for the land and water use plans as well as for particular development and use decisions.

A third planning requirement is an inventory and categorization of the nature, location and scope of existing land and water uses.[82] This will allow the identification of conflicts between current uses and, together with the land capability studies, will provide information on anticipated future conflicts of use and development as is required by the NOAA guidelines.[83]

A fourth and key element of planning will be, in the language of CAMA, the development of "specific criteria for particular types of land and water use in particular areas."[84] The NOAA guidelines require that this be stated in terms of broad guidelines or priority of uses in particular areas including specifically those of lowest priority.[85] The

78. N.C. GEN. STAT. § 113A-102(b)(2) (1974 Advance Legislative Service, pamphlet no. 3).

79. Vermont has taken the lead in this area. Vermont law requires that a land use plan be preceded by interim and final land capability studies and plans. VT. STAT. ANN. tit. 10, §§ 6041-43 (1973), *as amended*, (Cum. Supp. 1974). For an account of the Vermont planning process see F. BOSSELMAN & D. CALLIES, *supra* note 9, at 71-81.

80. 15 C.F.R. § 920.12 (1974).

81. A fertile source of such information is the North Carolina Sea Grant Program as well as the excellent research sponsored by the Water Resources Research Institute of the University of North Carolina. For example, an inventory of North Carolina's coastal wetlands has just been completed. A. HAWLEY, *supra* note 2.

82. This is specifically required by N.C. GEN. STAT. § 113A-110(a) (1974 Advance Legislative Service, pamphlet no. 3).

83. 15 C.F.R. § 920.12 (1974).

84. N.C. GEN. STAT. § 113A-110(a) (1974 Advance Legislative Service, pamphlet no. 3).

85. 15 C.F.R. § 920.15 (1974).

purpose of this element is to provide a basis for resolving use conflicts and for regulation of land and water uses.[86] Such criteria and guidelines are especially relevant for those areas that are neither presently developed nor given protection as areas of environmental concern, although the same mechanism can and should be used for the latter areas.

The question is presented whether these criteria and guidelines should be in the form merely of a traditional master plan in which all areas would be supplied with particular use designations. This is not required under either the CAMA or the NOAA guidelines, nor should it be. The limitations of traditional zoning as a mechanism for land use and resource decisionmaking are well documented.[87] Instead of the traditional master plan, more advanced planning and mapping techniques should be employed such as that advocated by Professor McHarg[88] that consists of color-coded overlay mapping based on analysis of natural areas and more conventional planning data that tend to disclose areas in which anti-developmental factors coalesce.

In addition to these mapping and planning techniques, there should be a review process in which particular development and use decisions are examined *to assess and to mitigate to the extent practicable their impact on the coastal environments.* The previously discussed land capability data can be used both to determine use priorities and to measure the impact of particular uses and classes of uses on the environment. To reduce delay and to alleviate the problem of ad hoc decisionmaking, local governments should develop a method of non-discretionary review according to certain fixed guidelines and conditions for small projects that do not significantly affect the environment while reserving discretionary review for larger projects regarding which standards, conditions and guidelines must be applied on a case-by-case basis.[89]

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86. *Id.*

87. *See* TASK FORCE ON LAND USE & URBAN GROWTH, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 182-92 (1973). *See also* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. CHI. L. REV. 681, 691-711 (1973).

88. I. MCHARG, DESIGN WITH NATURE 103-15 (1969). *See also* J. WUENSCHER & J. STARRETT, LANDSCAPE COMPARTMENTALIZATION: AN ECOLOGICAL APPROACH TO LAND USE PLANNING (Water Resources Research Institute of Univ. of N.C. Rep. No. 89, 1973).

89. The use of an environmental impact assessment method is required by the NOAA guidelines. 15 C.F.R. § 920.12 (1974). It is also consistent with the policy objectives of the CAMA. N.C. GEN. STAT. § 113A-102 (1974 Advance Legislative Service, pamphlet no. 3). For a more complete discussion of this mechanism see TASK

C. *Implementation and Enforcement*

Unlike the comprehensive coastal zone management program now in effect in California,[90] the CAMA does not provide any moratorium on development or interim regulatory mechanism to limit development and use decisions during the period in which the land use plans and areas of environmental concern are being formulated and before they have been declared adopted and effective. Interim areas of environmental concern may be established fairly promptly under the CAMA,[91] but this designation does not subject development to a permit requirement; it merely requires the developer to give the state sixty days notice before undertaking the proposed activity.[92] Existing special-problem local, state and federal regulatory and permit programs[93] will, hopefully, be administered to ensure, insofar as possible, wise decision-making until the mechanisms of the CAMA are fully implemented.

Another potential weakness of the CAMA concerns the implementation of the county land and water use plans that must be developed under state guidelines. The Act requires each local government to adopt a land use plan approved by the CRC, and the plans must be consistent with the state-designated areas of environmental concern.[94] The CRC has the power to compel changes in local regulations and ordinances to give effect to the protection given to areas of environmental concern. But as to areas not so designated, the CRC has only the power to review all local regulations and ordinances for their consistency with the adopted plans and, if any inconsistencies are found, to transmit recommendations for modification to the local government concerned.[95] There is no provision for state enforcement of the land use plans if local governments fail to act. Hopefully, local govern-

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FORCE ON LAND USE & URBAN GROWTH, *supra* note 87, at 193-217. A system of analysis for this purpose can be found in L. LEOPOLD, F. CLARKE, B. HANSHAW & J. BALSLEY, A PROCEDURE FOR EVALUATING ENVIRONMENTAL IMPACT (U.S. Geological Survey Circular No. 645, 1971). For compilations of guidelines see Marine Development Services (July, 1973) and MARINE RESOURCES DIVISION, S.C. WILDLIFE AND MARINE RESOURCES DEP'T, GUIDELINES FOR EVALUATING COASTAL WETLAND DEVELOPMENTS (1974).

90. California law generally provides for interim regulation in the form of a permit requirement for any development located seaward three miles or landward 1000 yards from the mean high tide mark. CAL. PUB. RES. CODE § 27104 (West Supp. 1974).

91. *See* text accompanying notes 69-70 *supra.*

92. N.C. GEN. STAT. § 113A-114(e) (1974 Advance Legislative Service, pamphlet no. 3).

93. For a summary of the principal existing federal, state and local legislation affecting the coastal zone of North Carolina see Schoenbaum, *supra* note 15, at 21-23.

94. N.C. GEN. STAT. §§ 113A-110(f), -111 (1974 Advance Legislative Service, pamphlet no. 3).

95. *Id.* § 113A-111.

ments will in good faith implement the plans and the state recommendations. If not, the CAMA should be amended to ensure local board implementation of the plans.[96] In any case, the CAMA provides that existing state regulatory laws, such as water and air pollution controls, applicable within the coastal area must be administered in coordination and consultation with the CRC.[97] This will permit the State in certain cases to indirectly influence implementation of the plans by the local governments.

(1) The Permit Procedure

The central mechanism for implementation of the management program established by the CAMA concerns only lands and waters designated as areas of environmental concern. After a date to be established by the Secretary of Natural and Economic Resources, which cannot be later than October 1, 1976 (the "permit changeover date"), no person can undertake any "development"[98] in an area of environmental concern without a permit.[99] Permits for "major developments," which are defined as developments that presently require a license or approval by some state agency or that occupy more than twenty acres or consist of a structure in excess of 60,000 square feet,[100] must be obtained from the CRC. On the other hand, permits for "minor developments," which are developments other than major developments,[101] may be obtained from the local government involved[102] if the latter has complied with the procedure for the establishment of a CRC approved implementation and enforcement program.[103]

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96. In this respect the CAMA does not go as far as the Washington Shoreline Management Act, which provides a permit regulatory system for the implementation of the master plans required to be formulated under the Act. WASH. REV. CODE § 90.58.140 (1973). The CAMA is superior in this regard to the California Coastal Zone Conservation Act which is not self-implementing and which is to be submitted to, and implemented by, the state legislature in 1976. CAL. PUB. RES. CODE § 27320 (West Supp. 1974).

97. N.C. GEN. STAT. § 113A-125(b) (1974 Advance Legislative Service, pamphlet no. 3).

98. See text accompanying notes 121-22 *infra* for discussion of the meaning of the term "development."

99. N.C. GEN. STAT. § 113A-118(a) (1974 Advance Legislative Service, pamphlet no. 3).

100. *Id.* § 113A-118(d)(1).

101. *Id.* § 113A-118(d)(2).

102. *Id.* § 113A-118(b).

103. If no approved local government permit program has been established, permits for minor developments must be obtained from the CRC. *Id.* Even if an approved local permit program is in operation, applications for minor developments must be filed with the CRC as well as the local government. *Id.* § 113A-119(a).

The procedure for the establishment of local permit programs requires eligible local

The Act's division of enforcement authority between state and local governments, a feature of other comprehensive management programs,[104] is a recognition of local government's ability to contribute to the development of a management program. The Federal Coastal Zone Management Act of 1972 and the NOAA guidelines are flexible in leaving to the states the details of state-local cooperation.[105] The CAMA has both direct state planning, regulation and establishment of criteria for local implementation programs together with state administrative review, which is in accord with federal requirements.[106] Predictably and appropriately, however, under the CAMA almost all projects within an area of environmental concern with a potential adverse impact on coastal resources will be directly regulated by the CRC. This results from the fact that under existing special-purpose legislation, which is preserved by the CAMA, state agencies exercise broad regulatory authority over developmental activities. When a state special-permit law is applicable, therefore, the CAMA defines the development as "major" no matter what number of acres or square feet are involved. For example, any development involving a discharge into surface waters or dredging or filling of estuarine waters or marshlands is a "major development" regardless of the area affected.[107]

All permit applications under the CAMA are required to be filed with the Secretary of Natural and Economic Resources and, if sought from a city or county, with a designated local official.[108] The public must be informed of permit applications through newspaper publication and through direct mailing to any citizen or group that has filed a request to be notified.[109]

governments to file a letter of intent to develop an enforcement program by July 1, 1975, (failure to meet this deadline does not bar later qualification). The CRC must adopt and transmit to the local government concerned criteria for local enforcement by September 1, 1975. The local governments, after holding a public hearing, must adopt an implementation program consistent with the state criteria by March 1, 1976. After adoption, but before it is declared effective, the CRC must review and within 45 days approve the local program or notify the local government of specific changes that must be made in order for it to be approved. After the approved implementation plan is effective, the CRC can assume enforcement of a local program in the event the local government fails to administer or enforce it. *Id.* §§ 113A-116 to -117.

104. *See* FLA. STAT. ANN. § 380.05 (Supp. 1973); WASH. REV. CODE § 90.58.050 (Supp. 1972).

105. 16 U.S.C. § 1455(b)(4) (Supp. II, 1972); 15 C.F.R. § 920.14 (1974).

106. 16 U.S.C. § 1455(b)(4) (Supp. II, 1972); 15 C.F.R. § 920.14 (1974).

107. For a partial listing of existing state special-permit laws see N.C. GEN. STAT. § 113A-125(c) (1974 Advance Legislative Service, pamphlet no. 3).

108. Such procedures will be required for federal administrative grants under the proposed federal guidelines. 15 C.F.R. § 923.32 (1974).

109. N.C. GEN. STAT. § 113A-119(b) (1974 Advance Legislative Service, pamphlet no. 3).

In the case of a major development, the CRC must approve or deny the permit within ninety days.[110] A hearing open to the public must be held at which the burden of proof is on the permit applicant.[111] The permit is to be denied by the CRC only upon certain specifically enumerated findings, but the granting of a permit may be conditioned on compliance with reasonable conditions necessary to protect the public interest.[112] The CAMA is silent on the number of votes required for CRC action, but presumably, it will act by majority vote of the total authorized membership.

Permit applications for "minor developments" are to be ruled on in the first instance by local governments that have approved permit-letting procedures.[113] In making their determination, they must use the same standards as are applicable to permit grant or denial by the CRC.[114] Any person directly affected[115] by the decision as well as

110. *Id.* § 113A-122(c). The Commission may extend this deadline by an additional ninety days if appropriate.

111. *Id.* § 113A-122(b)(7).

112. The statutory grounds for denial of a permit application are as follows:

(1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.

(2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).

(3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements or [*sic*] more than local concern identified in paragraphs a to c of subsection (b)(3) of G.S. 113A-113 [watersheds, capacity use areas and forestry land].

(4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in paragraphs a to h of subsection (b)(4) of G.S. 113A-113 [parks, streams, wildlife refuges and natural areas].

(5) In the case of areas covered by G.S. 113A-113(4), that the development will jeopardize the public rights or interests specified in said subdivision.

(6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in paragraphs a to e of subsection (b)(6) in such a manner as to unreasonably endanger life or property [sand dunes, beaches, floodways, areas subject to erosion and air pollution dangers].

(7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions 1 to 6 of this subsection.

(8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.

Id. § 113A-120(a).

113. Action must be taken on the permit application within 30 days (subject to extension for an additional 30 day period). In the absence of an approved local implementation plan, the Secretary of Natural and Economic Resources is given authority to rule on minor developments. *Id.* § 113A-121.

114. *See* note 103 *supra.*

115. See text accompanying notes 153-155 *infra* for a discussion of the meaning of this phrase.

the Secretary of Natural and Economic Resources may appeal a minor development decision by requesting a hearing before the CRC within twenty days of the decision.[116] The CRC must hold a hearing and dispose of the appeal within ninety days, making appropriate findings of law and fact.[117]

(2) Variances

The CAMA contains a provision allowing any person to petition the CRC for a variance granting permission to use his land in a manner otherwise prohibited by CRC rules or orders. Only the CRC, not local governments, are authorized to grant variances.[118] The CRC must notify interested persons and agencies and may, at its option, conduct a hearing within forty-five days of receipt of the petition. A variance may be granted only upon a showing of unnecessary hardship resulting from conditions peculiar to the property involved that could not have been reasonably anticipated when the applicable rule or order was adopted.[119]

These standards were apparently derived from the powers of a board of adjustment under principles of zoning law.[120] The application of this section by the CRC should be closely monitored to determine the appropriateness of carrying over to the CAMA standards applicable to the zoning process.

(3) Exemptions and Exclusions

The permit procedure established by the CAMA to protect areas of environmental concern is applicable only to proposed "development" by any person. The word "development" is a term of art; several activities are specifically excluded from being "development," which in effect, exempts them from the permit requirement although such activities are not exempt or excluded from the planning process established by the Act.

"Development" is broadly defined to include any construction activity as well as all alterations of the land or water by virtually any

116. N.C. GEN. STAT. § 113A-121(d) (1974 Advance Legislative Service, pamphlet no. 3). Pending the appeal, no action to undertake any development is permitted.

117. This may be extended an additional ninety days. *Id.* §§ 113A-122(b)-(c). The Secretary has the burden of proof before the CRC. *Id.*

118. *Id.* § 113A-120(c).

119. *Id.*

120. *Id.* § 153A-345(d) (1974).

means.[121] Exempted activities include highway, railway, utility and pipeline maintenance within existing rights of way, agricultural and forestry activity (except that involving dredging or filling of estuarine or navigable waters), utility siting to the extent regulated by the State Utilities Commission, emergency maintenance, repair and construction of buildings customarily accessory to existing structures (except as this involves filling or alteration of any dune or beach) and construction activities under pending zoning or building permits that are granted before July 1, 1974, as well as installation of road or utilities in any approved subdivision if construction was begun before April 12, 1974.[122]

The "grandfather" clauses were largely inspired by the California experience,[123] but they are irrelevant to the CAMA because the permit procedure will not be implemented for several months or even years.[124] Utility siting is, at present, not directly regulated by the State Utilities Commission and will be, at least temporarily, under the CAMA. The other exclusions seem reasonable except for the wholesale exemption granted for agriculture and forestry activities. It is anomalous that although prime forestry land may be designated an area of environmental concern,[125] timber harvesting practices within such areas are completely unregulated. Agricultural and forestry activities within areas of environmental concern should be subject to permit requirements at least to the extent that such activities in any area *involve a substantial change in the use of land or an adverse effect on fresh water wetlands or a substantial consumption of resources* after the permit changeover date.[126]

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121. *Id.* § 113A-103(5)(a) (1974 Advance Legislative Service, pamphlet no. 3).

122. *Id.* § 113A-103(5)(b).

123. The California permit requirement applies to any person "wishing to perform any development" on or after February 1, 1973. CAL. PUB. RES. CODE § 27400 (West Supp. 1974). This presented the problem of whether and to what extent the permit requirement was applicable to ongoing projects. This issue was resolved by the California Supreme Court in San Diego Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973). The majority, in a 4 to 3 decision, held that the California permit requirement applies only to development commenced after February 1, 1973, in effect exempting ongoing projects. North Carolina will face this issue not in connection with the effective date of the CAMA, but with regard to the "permit changeover date." *See* text accompanying notes 98-99 *supra.* The resolution of this issue under the CAMA is unclear. Perhaps the most reasonable accommodation was that proposed by the dissent in the *San Diego Regional Commission* case—that the developer who has performed substantial work must apply for a permit but the CRC must grant it after imposing reasonable conditions to guarantee fulfillment of the policy of the CAMA.

124. *See* text accompanying note 98 *supra.*

125. N.C. GEN. STAT. § 113A-113(b)(3)(c) (1974 Advance Legislative Service, pamphlet no. 3).

126. This would seem to be especially important in view of the rapid expansion of

In addition to the specific exemptions and exclusions from "development," the CAMA gives the CRC power to define by rule "certain classes of minor maintenance and improvements" which are exempt from the permit requirements.[127] It should be noted that the CRC cannot use this provision to exempt activities on an individual or ad hoc basis since the rulemaking power only applies to *classes* of minor activities.[128] Furthermore, the statutory considerations set out in the CAMA for the issuance of such rules as well as the policy bases of the Act require that any classes of maintenance or improvements that are exempted under this section must be minor both in terms of size and scope and in effect on the natural environment.[129]

(4) Judicial Review and Enforcement

Two provisions for judicial review are created by the CAMA. Any person directly affected[130] by a final CRC decision may obtain judicial review in the superior court of the county where the land is located. Whether, for purposes of this section, the Secretary of Natural and Economic Resources is a person directly affected by a Commission order is unclear. It is clear, however, that the Secretary is directly affected by and can appeal to the CRC the grant or denial of a permit by a local official.[131] It would thus appear that he could obtain judicial review as well. No development can be undertaken until final disposition of the litigation.[132] In addition, any person having an interest in land within an area of environmental concern may obtain judicial review to determine whether a final CRC decision affecting such land constitutes the equivalent of a taking of property without compensation. In such an action, the burden of proof of a reason-

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corporate farms in eastern North Carolina. These farms are often several hundred-thousand acres in extent and pose problems of pollution and destruction of inland wetland areas. *See* The News and Observer, May 12, 1974, at 1, col. 4. It would appear that implementation of this requirement would involve specific amendment of the CAMA. However, without such a curative amendment, these exemptions for agriculture and forestry may well be unconstitutional as the grant of an exclusive or separate emolument or privilege or as a denial of the equal protection of the laws. Discussion of this issue is beyond the scope of this article, but see Glenn, *supra* note 20, at 313-14.

127. N.C. GEN. STAT. § 113A-103(5)(c) (1974 Advance Legislative Service, pamphlet no. 3).

128. *Id.*

129. *Id.*

130. See text accompanying notes 153-55 *infra* for discussion of the meaning of this phrase.

131. N.C. GEN. STAT. § 113A-121(d) (1974 Advance Legislative Service, pamphlet no. 3).

132. *Id.* § 113A-123(a).

able exercise of the police power is on the CRC, the right of trial by jury is guaranteed and trial is to be expedited over all other civil or criminal actions.[133]

The latter procedure for judicial review was another last minute amendment to the CAMA. Except for the procedural advantages guaranteed property owners, it adds nothing to the right of judicial review granted by the former provision. It does not add to the class of *persons* who may obtain review since an owner of land would always be a "person directly affected" by any order relating to the land. It does not broaden the class of *orders or decisions* that may be reviewed since both provisions are limited to decisions or orders of the CRC under Part Four of the CAMA.[134] This concerns the disposition of permit applications and appeals,[135] not the interim or final designation of areas of environmental concern. The latter designations are not reviewable under either section since they are determined by the CRC only under the authority of Part Three of the CAMA.[136] Furthermore, the owners' judicial review provision does not broaden the *subject matter* of judicial review because, in any proceeding brought under the general review provision, a court could examine the constitutional question of "taking" as well as statutory issues.

The CAMA provides that in the event an order or decision of the CAMA is void as an unconstitutional "taking,"[137] the Department of Administration with the consent of the Governor and the Council of State may purchase the land in question through use of the statutory procedure for eminent domain.[138] This procedure is in accord with the

133. *Id.* § 113A-123(b). The right to have trial expedited over all other civil or criminal actions is almost certainly unwise. It places the speedy determination of an individual's property rights over the constitutional right of a criminal defendant to a speedy trial. In addition, such actions require extensive preparation and expedition of them might be useless or even detrimental to the party involved.

134. *Id.* §§ 113A-123(a)-(b).

135. *Id.* § 113A-122(b). It is well established in North Carolina that there is no right of judicial review from agency rulemaking. *See* Housing Authority v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964); Note, *Judicial Review in State and Federal Courts*, 36 N.C.L. REV. 473 (1958). Under the 1974 North Carolina Administrative Procedure Act, agency rulemaking is generally not reviewable. N.C. GEN. STAT. §§ 150A-2(2), -43 (1974 Advance Legislative Service, pamphlet no. 5).

136. N.C. GEN. STAT. §§ 113A-113 to -115 (1974 Advance Legislative Service, pamphlet no. 3).

137. Discussion of the "taking" issue is beyond the scope of this article but can be found in Glenn, *supra* note 20, at 327-38.

138. N.C. GEN. STAT. § 113A-123(c) (1974 Advance Legislative Service, pamphlet no. 3). This provision would be made more effective if it were specifically provided that the decision that the restricted amounts to a "taking" will not take effect for a period of time, giving the state time to take action to purchase the property. It should

long established program of the state for the acquisition of estuarine and coastal lands[139] and coincides with the provision of the Federal Coastal Zone Management Act allowing the Secretary of Commerce to make grants to the states for the purpose of the acquisition and operation of estuarine sanctuaries.[140]

Upon any violation of any provision or order of the CAMA, the CRC (or the local government in the case of violations of permits for minor development) may institute a civil action for injunctive relief.[141] The CRC can also assess civil monetary penalties, and a knowing or willful violator of the act is subject to criminal prosecution.[142] The maximum civil penalty ($1000) is minimal, however; the CAMA should be amended to require a violator to pay the cost, if any, of restoring damaged lands or waters to their pre-violation condition.[143]

(5) Public Participation

Public participation and provision for citizen involvement in decisionmaking is required by the NOAA guidelines for the establishment of a coastal zone management program.[144] The CAMA mandates or allows the holding of public hearings in connection with the development of the local government land use plans,[145] the designation of areas of environmental concern,[146] local government implementation programs,[147] and the consideration of permit applications.[148] Regulations and guidelines must be published for public comment before final adoption,[149] and permit applications are to be available to the public.[150] Any citizen or group may register with the Secretary of

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also be specifically stated that the determination of a "taking" does not affect any land other than that which is the subject of the decision. *See* DEL. CODE ANN. tit. 7, § 6613 (Supp. 1973).

139. *See* Heath, *supra* note 30.

140. 16 U.S.C. § 1462 (Supp. II, 1972).

141. N.C. GEN. STAT. § 113A-126 (1974 Advance Legislative Service, pamphlet no. 3).

142. *Id.* §§ 113A-126(c)-(d).

143. This principle of liability for damage to public resources is a feature of the North Carolina Oil Pollution Control Act of 1973. *Id.* § 143-215.90 (1974). *See* C. STONE, SHOULD TREES HAVE STANDING? 29-30 (1974).

144. 15 C.F.R. §§ 920.30-.32 (1974).

145. N.C. GEN. STAT. §§ 113A-110(e)-(f) (1974 Advance Legislative Service, pamphlet no. 3).

146. *Id.* §§ 113A-114(b), -115(a).

147. *Id.* § 113A-117(b).

148. *Id.* § 113A-120(a).

149. *Id.* §§ 113A-107(c), (f).

150. *Id.* § 113A-119(b).

Natural and Economic Resources to receive individual notice of rules, regulations and permit applications.[151] These provisions would seem to meet the minimum federal requirements. Care should be taken in the implementation of the CAMA to ensure that the public hearing provisions provide an opportunity for citizen participation in the development of policy.

Much more could be added, however, to ensure meaningful public participation. Standing could be granted to any member of the public to maintain an action for declaratory and equitable relief or the recovery of civil penalties upon any violation of the CAMA. This would supplement the enforcement efforts of state agencies and is appropriate since one of the express purposes of the CAMA is to protect public rights in coastal zone resources.[152] Citizens and citizen groups could also be expressly allowed to appeal any grant of a minor development permit to the full CRC, to intervene as a party in proceedings before the CRC and to obtain judicial review of the grant or denial of a permit by the CRC.

The CAMA presently allows "[a]ny person who is directly affected"[153] to obtain CRC review of a local permit decision or judicial review of a CRC permit decision. In North Carolina similar language in other statutes has been held to have no precise meaning and to be dependent on the circumstances involved.[154] This language should be interpreted in connection with the CAMA to allow persons who show an adverse effect on their actual past and present use of the particular coastal resources involved to which they have legally recognized rights as members of the public to be considered "persons directly affected" by the granting of a permit.[155]

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151. *Id.* § 113A-124(a)(3).

152. Provision for this form of citizen suit is a feature of the California Coastal Zone Conservation Act, CAL. PUB. RES. CODE §§ 27425-46 (West Supp. 1974).

153. N.C. GEN. STAT. §§ 113A-121(d), -123(a) (1974 Advance Legislative Service, pamphlet no. 3).

154. *In re* Halifax Paper Co., 259 N.C. 589, 595, 131 S.E.2d 441, 443 (1963). It is interesting to compare the statutory language regarding "standing" to obtain judicial review under the CAMA with the standard for "standing" under the 1974 Administrative Procedure Act. The latter confers "standing" to obtain judicial review on any "person aggrieved," which is defined as "any person . . . directly or *indirectly* affected," N.C. GEN. STAT. § 150A-2(6) (1974 Advance Legislative Service, pamphlet no. 5) (emphasis added), while the CAMA gives standing only to persons "directly affected" without defining this term.

155. This standard would be similar to that approved by the United States Supreme Court under the Federal Administrative Procedure Act for judicial review of agency actions affecting the environment. United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); *see* Note, *Saving the Seashore: Management Planning for the Coastal Zone*, 25 HASTINGS L.J. 191, 202-04 (1973).

IV. Administration and Agency Coordination

The principal responsibility for the development and implementation of a coastal area management program is given to the Coastal Resources Commission (CRC), a new state agency established within the Department of Natural and Economic Resources.[156] The CRC is a part-time board composed of fifteen members. The CAMA also establishes a Coastal Resources Advisory Council composed of not more than forty-seven members who are required to be designates of various state agencies, counties and regional planning districts as well as persons selected for their technical expertise.[157]

One of the chief controversies involved in the enactment of the CAMA concerned the make-up of the CRC. Earlier drafts of the bill gave this power to the Governor.[158] The CAMA as enacted, however, provides that twelve of the fifteen members must be selected by the Governor from among nominees chosen by the local governments of the coastal area.[159] Furthermore, two of the three members chosen directly by the Governor must be actively connected with coastal land development or its financing.[160] Provisions contained in earlier drafts[161] prohibiting conflicts-of-interest situations were deleted from the final act.

This selection procedure makes it virtually certain that severe problems of conflict-of-interest will arise and raises the question whether the CRC will uphold state values and public rights in the resources of the coastal zone. The NOAA guidelines require that a state management program be administered by an organizational structure that ensures state involvement in land and water use decisions in the coastal zone.[162] The details of the institutional arrangements are left to the states,[163] but possibly an institutional structure such as that provided by the CAMA, which is state-level in form but is in substance locally controlled does not comply with the NOAA guidelines. Even if the CRC as presently constituted complies with the federal act and

156. N.C. Gen. Stat. § 113A-104 (1974 Advance Legislative Service, pamphlet no. 3).

157. *Id.* § 113A-105. The function of this group is to render advice on whatever questions the CRC deems appropriate. *Id.* The CRC will thus determine how much influence and power this body will exercise.

158. For an earlier draft see Schoenbaum, *supra* note 15, app. at 31.

159. N.C. Gen. Stat. §§ 113A-104(c)-(d) (1974 Advance Legislative Service, pamphlet no. 3).

160. *Id.* §§ 113A-104(b)-(c).

161. *See* Schoenbaum, *supra* note 15, app. § 5(2)(c), at 33.

162. 15 C.F.R. § 920.16 (1974).

163. *Id.*

guidelines, it would be desirable to amend the CAMA to eliminate conflicts-of-interest and to ensure more state level participation in decisionmaking.

Another problem that must be dealt with by a comprehensive coastal zone management program is the coordination of agency and the governmental decisionmaking. In the past, piece-meal regulation by mission-oriented agencies and levels of government has resulted in an undesirable fragmented pattern of control.[164]

Under the CAMA, several mechanisms are provided to ensure better coordination of decisionmaking. State-local cooperation is fostered through the planning process that requires local government planning consistent with state guidelines and subject to state approval.[165] Coordination with specialized agencies on the state level is furthered through the requirement that after the "permit changeover date,"[166] no regulatory permit in the coastal area can be issued without prior consultation with the CRC.[167] This presents a difficulty because there are no statutory means through which conflicts between the CRC and other state agencies may be resolved. Hopefully, this procedure can be improved by requiring coordinated *planning* as well as coordinated regulation. Procedures must be created to require coordination among all state agencies having planning responsibilities. Conflicts between plans should be identified and resolved at an early stage. This would not only ensure that different agencies of state government coordinate their construction projects, but would also allow specialized state regulatory agencies to act quickly with respect to licensing or permit-letting activities.[168]

The CAMA also provides for coordination with federal and interstate agencies having responsibility for the coastal zone,[169] but no precise mechanism for coordination is created. The Federal Coastal Zone Management Act requires federal agency activities to be consistent with approved state management programs to the "maximum extent feasible," and after federal approval of a state management program, applicants for federal permits must include in their application a state certification that the activity will be conducted in accord with

164. *See* Schoenbaum, *supra* note 15, at 21.
165. *See* text accompanying notes 59-60 *supra.*
166. *See* text accompanying note 98 *supra.*
167. N.C. GEN. STAT. § 113A-125(b) (Advance Legislative Service, pamphlet no. 3).
168. The CAMA provides for study by the CRC of better coordination procedures to be recommended to the 1975 General Assembly. *Id.* § 113A-125(d).
169. *Id.* § 113A-127.

the state program.[170] This mechanism together with the review procedures established by the National Environmental Policy Act[171] will provide the basis for federal-state cooperation.[172] It is clear, however, that the federal government can preempt state management decisionmaking in particular cases, and requirements of the Federal Water Pollution Control Act as well as the Clean Air Act are paramount.[173] The state management program must develop better mechanisms for the coordination of planning with federal agancies for facilities such as parks; wildlife areas; energy production, storage, and distribution facilities; highways; and transportation facilities.

V. CONCLUSION

Through the enactment of the Coastal Area Management Act of 1974, North Carolina has taken a necessary first step toward the establishment of a comprehensive coastal land and water management program. No definitive judgment of its effectiveness can be made until after it is fully implemented. It is clear, however, that even though the Act may meet the minimum federal guidelines for a state coastal zone management program under the Federal Coastal Zone Management Act of 1972,[174] it contains serious flaws that may subvert its effective operation. These include the exclusively local character of the Coastal Resources Commission, the lack of legal requirements to assure the implementation of the planning process, and the exemptions given to certain interest groups, especially agriculture and forestry. The implementation of the Act should be carefully monitored by interested groups, and continuing empirical research on its operation and effectiveness are needed.

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170. 16 U.S.C. §§ 1457(c)(1)-(3) (Supp. II, 1972).

171. 42 U.S.C. §§ 4331-47 (1970).

172. The federal government has major responsibilities for regulating activities in coastal and navigable waters. *See generally* Kramon, *Section 10 of the Rivers and Harbors Act: The Emergence of a New Protection for Tidal Marshes*, 33 MD. L. REV. 229 (1973). In addition, recent court decisions have upheld the jurisdiction of the federal government under section 404 of the Federal Water Pollution Control Amendments of 1972 to regulate the discharge of dredged or fill materials on wetlands *above* mean high tide. United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974). The Environmental Protection Agency is currently preparing regulations on the problem.

173. 16 U.S.C. § 1457(f) (Supp. II, 1972). It has been pointed out that, as a result, state coastal management programs will be directed primarily toward improved land use regulation. *See* Mandelker & Sherry, *supra* note 8, at 136-37.

174. In July 1974 North Carolina was awarded a $300,000 federal grant under the Federal Coastal Zone Management Act of 1972. The News and Observer, July 8, 1974, at 24, col. 5.